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November 18, 1993

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Mr. Gregory A. Popowicz, CFA
Professional Financial Associates, Inc.
29355 W. Nine Mile Road
Farmington, MI 48336

RE: Popowicz-Viatical Contract Settlements
File No.: 500779

Dear Mr. Popowicz:

The Bureau acknowledges receipt of your letters and enclosures of March 30, 1993 and May 14, 1993 and your request for an interpretive opinion/no-action position regarding whether the offer and sale of viatical settlements come within the definition of security under Section 401(1) of the Michigan Uniform Securities Act, 1964 PA 265, as amended (the "Act").

You state that typically there are four participant groups involved in each transaction (although each group could consist of only a single individual): A purchaser ("P") who wishes to invest cash with the objective of realizing a suitable return thereon; a seller ("S") who is the owner of a life insurance policy on his/her life who is competently diagnosed as terminally ill with a life expectancy of usually less than two years, and whose life insurance policy does not have a provision for accelerated death (living benefits which would provide S with cash before death); a third party ("TP") who performs a brokerage function by bringing P and S together and who, together with affiliated agents, will receive a commission for performing this role, but will not be acting as a principal in the transaction by receiving funds directly from P or advancing any of TP's funds to S under any conditions; and, an escrow officer ("E") who is typically a licensed attorney, maintaining a trust account.

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You represent that each transaction is usually structured along the following lines:

- Step 1: The third party broker does not maintain an "inventory" of policy sellers. TP acts solely as agent for P at all times, a fact which is disclosed to S, who is generally represented by his/her own legal counsel. S comes to TP's attention usually by referral (e.g., AIDS counseling centers, seller's own insurance carrier, etc.) TP does not solicit sellers, and does not make a market after the close of any transaction.
- Step 2: TP or one of its agents approaches P who is willing to make an investment in an existing life insurance contract. P specifies certain parameters to TP (e.g., the amount available to invest, A.M. Best rating of insurance company), executes a limited power of attorney in favor of TP authorizing it to act as P's agent in attempting to find a S to match P's desired profile, and deposits the investment amount by opening an escrow account with E. (P's investment amount is always made payable to the escrow trust account, not to TP).
- Step 3: P and his/her independent financial counsel are given a complete copy of the file of information on S, which does include S's identity, full medical records (as released by S's written authorization), the opinion of independent medical doctors as to S's life expectancy, and copies of the written sales agreement approved by S's legal counsel, together with joint escrow instructions to E, written consents to the transaction by the affected insurance company, and written releases from all pre-existing beneficiaries.
- Step 4: The insurance policy and related documents are gathered from S and deposited by TP with E. Except upon the explicit waiver and consent by P, every S has a life expectancy of no greater than 24 months which is the amount of insurance premiums placed into escrow by S to keep the insurance policy in force. E releases P's investment directly to S less commissions due to TP and its agents and E's fees, all of which have been previously disclosed to S. At this point, TP has completed its performance under the agreement with both P and S.
- Step 5: The escrow remains open with E until the time of S's death. At that time, either P or E will present a claim for death benefits to S's life insurance carrier. Payment by the carrier is made directly payable to P, but is usually sent to E. E then forwards the payment to P and the escrow is formally closed.


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You make two additional points. First, if TP should be unsuccessful in finding a match under Step 3 during a predetermined time interval, escrow will close by having E refund P's entire investment, releasing TP from the limited power of attorney, and without payment of any commissions. Second, P may purchase only a partial beneficial interest (fractionalized interest), thus there could be multiple P's entered as fractional (but all primary, non-contingent) beneficiaries under the same life insurance contract. With respect to fractional beneficial interests, the attorney who handles the escrow is designated as trustee for the multiple P's and as such is the sole beneficiary under the policy. In that capacity, E/T will collect the death benefit from the carrier and remit to the several purchasers.

Based on the foregoing, it is the Bureau's position that the fractionalized interests (pooling arrangements) are securities as defined in Section 401(1) of the Act. Sections 101 and 301 of the Act would therefore apply. In addition, the third party providing the brokerage function would be required to register as a securities "broker-dealer" and "agent" under Section 201(a) of the Act. Whether or not a security is present when one seller is matched with a buyer would depend on the specific facts of each case. In particular, the Bureau would be interested in the method and nature of the marketing of such one-on-one matching services. The more general solicitation which is done and the presence of emphasis in investment potential to noninstitutional participants, the greater the likelihood that the Bureau would consider the transaction to involve a security. In the case as presented by you, the Bureau would not take action in regard to one-to-one matching transactions where no "investment" solicitation of a general nature is done. Please be advised that Section 402(c) of the Act provides that the burden of proving an exemption or an exception from a definition is upon the person claiming it.

This letter is based on the facts of the specific situation as presented to the Bureau in your correspondence and enclosures. It should be noted that any different facts or conditions might require a different conclusion. Therefore, this letter should not be considered as a basis for reliance by any other person nor by you in any other circumstances beyond those described in your submissions to the Bureau.

Sincerely,


Carl L. Tyson, Director
Corporation and Securities Bureau
(517) 334-6200

CLT/RCJ/ks